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No. 06-822

In The
Supreme Court of the United States

CAROLYN G. KOCHERT, M.D.,

Petitioner,

v.

GREATER LAFAYETTE HEALTH SERVICES, INC. d/b/a LAFAYETTE HOME HOSPITAL and d/b/a ST. ELIZABETH'S MEDICAL CENTER, JOHN WALLING and ANESTHESIOLOGY ASSOCIATES, P.C.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OF THE RESPONDENT ANESTHESIOLOGY ASSOCIATES, P.C.

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. Whether the Petitioner has presented any compelling reason to grant the Petition based on her confusion of the standard for admitting expert testimony, as set forth in FED. R. EVID. 702 and by this Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), with the standard for entry of summary judgment under FED. R. CIV. P. 56(c).

II. Whether Petitioner has presented any compelling reason to grant the Petition, where the Seventh Circuit's Opinion affirming the district court's Decision and entry of summary judgment against the Petitioner, on the grounds that she lacks antitrust standing because she has not suffered an antitrust injury and is not an efficient enforcer of the antitrust laws, is based on well-settled federal law.

CORPORATE DISCLOSURE STATEMENT AS REQUIRED BY SUPREME COURT RULE 29.6

There are no parties to the proceedings other than those listed in the caption.

Respondent, Anesthesiology Associates, P.C., is a medical professional corporation organized under the laws of, and domiciled in, Indiana. Anesthesiology Associates, P.C. has no parent corporation. All of the stock of Anesthesiology Associates, P.C. is privately held by individuals, and no public entity holds 10% or more of its stock.

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SUMMARY OF REASONS TO DENY THE PETITION

The Petitioner, Carolyn G. Kochert, M.D. ("Petitioner" or "Kochert") has presented no compelling reason for granting her Petition for a Writ of *Certiorari* ("Petition"). *See* SUP. CT. R. 10. Petitioner has failed to demonstrate that the October 6, 2006, Opinion of the Court of Appeals for the Seventh Circuit ("Opinion"), which affirmed the December 29, 2004, Decision of the District Court for the Northern District of Indiana, granting summary judgment for the Respondents on all of Petitioner's claims ("Decision") is in conflict with any decision of this Court or another Court of Appeals. Petitioner has not presented any important question of federal law that has not been settled by this Court. Petitioner's claim that the Opinion and Decision of the lower courts improperly melded the standards for admissibility of expert witness testimony under FED. R. EVID. 702 and this Court's opinion in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), with the standard for granting summary judgment under FED. R. CIV. P. 56 is based on her misapplication of those standards. A determination that an expert's report or testimony is relevant and reliable under *Daubert* does not automatically preclude entry of summary judgment. A district court's admission of expert testimony does not equate to a finding that there are genuinely disputed material facts sufficient to preclude entry of summary judgment.

The lower courts correctly found that the Petitioner lacks antitrust standing because she failed to demonstrate the existence of an antitrust injury proximately caused by the antitrust violations she alleged and that she would be

an efficient enforcer of the antitrust laws. The lower courts reached the correct result on the basis of Kochert's lack of antitrust standing, and on other grounds omitted by the Petitioner in her presentation to this Court.

Petitioner's suggestion that this Court should provide instruction to lower courts to provide greater detail in their rulings is not a proper ground on which to grant the Petition. This Court should deny the Petition because this case does not qualify for, nor otherwise merit, review by this Court.

STATEMENT OF THE CASE

The dispute in this case is whether Kochert, a pain management specialist who no longer practices anesthesia, has standing to bring, and has suffered, an antitrust injury proximately caused by the Respondent, Anesthesiology Associates, P.C.'s ("Anesthesiology Associates") 1998 decision not to renew her subcontract to provide anesthesia services at Lafayette Home Hospital ("Home Hospital"); the 1999 decision of the Respondent, Greater Lafayette Health Services, Inc. ("GLHS"), to close its obstetrics unit at Saint Elizabeth's Medical Center ("St. Elizabeth Medical Center"); and GLHS's 2001 decision to use a single contract provider for anesthesia services at its Home Hospital and St. Elizabeth Medical Center campuses, by awarding the exclusive anesthesia services contract to Anesthesiology Associates, and not to Lafayette Anesthesiologists, Inc. ("Lafayette Anesthesiologists"), a competing group of anesthesiologists with which Kochert had severed her ties in 2000. The Petitioner asserted claims under Sections 1 and 2 of the Sherman Act (15

U.S.C. §§ 1, 2) and comparable provisions of Indiana law, alleging unreasonable exercise of monopoly power, conspiracy to monopolize, tying, group boycott, an alternative group boycott theory and an essential facilities theory. The lower courts correctly held that she did not demonstrate any injuries to competition, and that her Sherman Act claims were otherwise deficient as a matter of law.

Petitioner's Factual Background section of her Statement of the Case misstates the facts in several important respects. First, Kochert states that "Throughout the entire time period of this case," she "remains in Lafayette as a competitor in anesthesiology." Petition, p.6. Kochert contradicts her own statement on the next page of her Petition, when she states she sought work in a field outside anesthesiology in March 1988 (*id.* at 7), and that she trained for and established a pain management practice, in which she worked on a full-time basis by the fall of 2000. *Id.* at 8. The district court found that Kochert "was no longer in the business of providing anesthesia services[1] ... and had opened her own pain management practice and was doing pain management on a full time basis by August 1, 2000." Petitioner's Appendix ("Pet. App."), p. 23. The Seventh Circuit Court agreed. *Id.* at 3.

Kochert was not precluded from practicing inpatient and obstetrical anesthesiology at St. Elizabeth Medical Center when her subcontract with Anesthesiology Associates to provide services at Home Hospital was not

[1] The district court adopted Kochert's definition of "anesthesia services" as those anesthesia services provided to inpatient surgical and obstetrical patients, but not including anesthesia services provided to outpatients. Pet. App., 28. The exclusive services contracts at issue covered both inpatient and outpatient services.

renewed. Almost a year before the GLHS exclusive services contract was awarded to Anesthesiology Associates, Kochert had left the practice of anesthesiology and opened her own full-time pain management practice. *Id.*

Petitioner's conclusory statement that she "was excluded from the market" in March, 1998, when her subcontract with Anesthesiology Associates expired, is also erroneous. Petition, 7. After March 1, 1998, when her subcontract at Home Hospital expired, Kochert conceded that she continued to practice the full range of anesthesia services at St. Elizabeth Medical Center until at least August, 2000, and could have continued to do so after that, but for her own choice to open her own a competing pain management practice. *See* Pet. App., 3, 23. From March 29, 1998, through June 1, 2001, Lafayette Anesthesiologists held the exclusive contract to provide anesthesia services at St. Elizabeth Medical Center. *See* Pet. App., 2, 20-21.

Petitioner's unsupported statement that Dr. Kenneth J. Bochenek (president of Anesthesiology Associates) and Mr. John Walling (former chief executive officer of GLHS) "testified to the non-existence of the exclusive arrangement . . . as of March 1, 1998," is wrong. Petition at 7. To the contrary, Dr. Bochenek and Mr. Walling testified that the exclusive services arrangement between Anesthesiology Associates and Home Hospital was continuously renewed from 1994 through 2001, and the district court expressly rejected all of Kochert's contentions about the lapse in renewals of this agreement on the grounds of *res judicata*. Pet. App., 32-33. Kochert's claims regarding non-renewal of this contract were also litigated by her against the Respondents in the Indiana, Tippecanoe Circuit Court,

under Cause No. 79C01-0001-CP-0007, and decided against her on summary judgment.[2] Pet. App., 20, 32-33.[3]

Further, the Seventh Circuit court noted that it "had serious doubts about the usefulness of Kochert's evidence." Pet. App., 17. In affirming the district court's summary judgment on all of Kochert's antitrust claims, the Circuit court stated, "no reasonable jury, examining Kochert's evidence of diminished quality, could find it credible as proof of such diminution. Kochert has not introduced any evidence that would allow a jury to compare the quality of care prior to defendants' anticompetitive acts with the quality of care after these acts." *Id.*; *see also id.* at 27 (Kochert failed to demonstrate effects on price or quality "that occurred after the exercise of market power.").

Summary judgment was correctly granted because the Petitioner lacks antitrust standing and failed to come forth with admissible evidence to sustain each element of her claims. FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). The district court found that Petitioner failed to meet this burden and that the Respondents

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[2] The district court noted that this is Kochert's third lawsuit against the Respondents concerning the expiration of her 1998 Anesthesiology Associates subcontract. Pet. App., 20, 32-33.

[3] Petitioner's statements about "animus between her and Dr. Bochenek and Mr. Walling over patient care issues" (Petition, 7) are unsupported in the record, but are superfluous and not material to any issue in dispute. *See also* Petitioner's statement that "animus" against her "forced [her] to look for other work in the field of medicine besides anesthesiology as early as March 1, 1998." *Id.* No evidence in the record supports this statement regarding unspecified "animus." Rather, the evidence shows that Kochert made a personal decision to open her own pain management practice, and that as a result her annual earnings increased. Pet. App., 123.

were entitled to summary judgment as a matter of law. Pet. App., 24. The Circuit court affirmed. *Id.* at 17.

ARGUMENT IN OPPOSITION TO THE PETITION

Kochert contends that the courts below confused the standard for admissibility of evidence under FED. R. EVID. 702 with the summary judgment standard under FED. R. CIV. P. 56(c),[4] and that this Court should instruct the lower courts to provide more detailed explanations in ruling on such motions. Petition, 11-12. To the contrary, the lower courts were quite clear in their reasoning and made separate, detailed entries correctly applying the relevant standards for the admissibility of the expert testimony and the entry of summary judgment.

Kochert was unable to establish her standing as a proper antitrust plaintiff because she did not suffer an antitrust injury of the type the antitrust laws were intended to redress and which flowed directly from the illegal acts she claims were committed by the Respondents, and she did not demonstrate that she would be an efficient enforcer of the antitrust laws. The district court made specific findings as to legal deficiencies of each of Kochert's Sherman Act claims. Pet. App., 24-34. The Seventh Circuit expressed its "serious doubts" about Kochert's claims and evidence, but did not reach that part of the analysis because it affirmed Kochert's lack of antitrust standing. *Id.* at 17.

[4] Kochert refers to the summary judgment standard as the "sufficiency" standard. Petition, 12.

A. The Trial Court's Admission Of A Party's Expert Testimony Under *Daubert* Does Not Preclude The Court's Subsequent Entry Of Summary Judgment Against That Party.

Kochert argues that her Petition should be granted because lower courts, including those in this instance, often confuse the standards for admissibility of expert testimony with the summary judgment standards for sufficiency of the evidence. Petition, 15-16. Kochert argues that in confounding the tests for admissibility of expert testimony under *Daubert* with the standard for granting summary judgment, the lower courts went too far and decided a material question of fact that should have been reserved for the jury. *Id.* at 13. Even after admitting the reports and testimony of Kochert's experts, the district court correctly granted summary judgment because Kochert failed to sustain each element of her claims with admissible evidence, and Respondents were entitled to judgment as a matter of law. Pet. App., 17, 34.

1. Admissible, Expert Testimony Is Not Necessarily Sufficient Evidence To Preclude Entry Of Summary Judgment As A Matter Of Law.

While it may be true as Kochert states that when "all of the essential parts of a party's case pass *Daubert,* this will virtually always be enough to proceed to trial" (*id.* at 13-14), the situation here does not lead to the same conclusion. When a party presents proof of some, but not all, of the essential parts of her case, even if that proof passes muster under *Daubert,* the missing elements will entitle the moving party to summary judgment as a matter of law. The *Daubert* Court expressly noted that summary judgment may be entered by a district court

even after admitting testimony of an expert offered by the non moving party. 509 U.S. at 596.[5] The point was reiterated in the concurring opinion of Justice Breyer in *General Electric Co. v. Joiner,* 522 U.S. 136, 148, n.9 (1997). Having twice eschewed the more stringent general acceptance test of *Frye v. United States,* 293 F. 1013 (1923), and expressed its view that the standards for admissibility of expert testimony should be applied so as to admit testimony that is relevant and reliable, leaving trial courts to use "more conventional devices" such as directed verdict and summary judgment, where the evidence is insufficient to sustain a reasonable juror's conclusion in favor the non moving party, it would be incongruous for this Court now to adopt Kochert's view that having once admitted expert testimony, the trial court is precluded from assessing the sufficiency of that expert testimony when presented with a motion for summary judgment. The conclusion that expert testimony is admissible does not lead to the inevitable conclusion that the expert's testimony is sufficient to preclude entry of summary judgment. *Daubert,* 509 U.S. at 596. It is Kochert, and not the lower courts, who confuses the standards for admissibility and sufficiency.

The Seventh Circuit's Opinion is not in conflict with *In re Eastern & So. Dist. Asbestos Litig.,* 52 F.3d 1124,

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[5] "[I]n the event the trial court concludes the scintilla of evidence presented supporting a position is insufficient to allow a reasonable juror to conclude that the position more likely than not is true, the court remains free to direct a judgment, FED. R. CIV. P. 50(a), and likewise to grant summary judgment, FED. R. CIV. P. 56. . . . These conventional devices, rather than wholesale exclusion under an uncompromising general acceptance test, are the appropriate safeguards where the basis of scientific testimony meets the standards of Rule 702." *Daubert*, 509 U.S. at 596.

1132-33 (2d Cir. 1995). The Second Circuit court found specific instances where the district court invaded the role of the fact finder. *Id.* at 1128-30. In Kochert's case, no lower court weighed the evidence, made a credibility decision or decided a material question of genuinely disputed fact. Finding that expert testimony passes the relevancy prong of the *Daubert* test is not tantamount to finding that there is a material fact in dispute sufficient to preclude entry of summary judgment as a matter of law. The standards for admissibility under FED. R. EVID. 702 and for sufficiency under FED. R. CIV. P. 56(c) are distinct, and were not conflated by the lower courts as Kochert contends.

2. Kochert's Expert Witness Testimony Was Not Sufficient To Forestall Summary Judgment.

Contrary to Kochert's assertion (Petition, 14), Kochert's experts did not provide admissible evidence sufficient to establish her antitrust standing, and thus she failed to establish all of the essential elements of her claims. *See* Pet. App., 17. When expert testimony is admitted, it is not invariably enough to create a genuine dispute of material fact. Kochert admits that even when expert testimony has been admitted, if the non moving party has not produced any evidence (whether expert testimony or other evidence) on an element of the claim, summary judgment may be properly granted. Petition, 14. Kochert postulates that summary judgment is frequently entered following a district court's ruling that a party's expert's opinions are inadmissible under Rule 702, but contends that the converse of that situation, while rare, should not be permitted because to do so allows the trial court to usurp the role of jury. *Id.* Kochert's reasoning is flawed

because she assumes that all such situations involve the improper weighing of evidence by a district court. Further, admitted expert testimony, even if material, when viewed in the context of all of the evidence before the trial court, may not be sufficient to defeat summary judgment.

In addition to the Seventh Circuit's Opinion in this case, courts in the Sixth, Eighth, Ninth and Eleventh Circuits have held that admission of a party's expert testimony is not inevitably fatal to the opposing party's motion for summary judgment.[6] Kochert claims that her case is different, and that she presented admissible expert testimony on all facts necessary to sustain her antitrust claims. Petition, 15. The Record does not sustain Kochert's claims.

In *Bailey,* the Eleventh Circuit court held that, even assuming the expert's analysis was admissible and correct, it failed as a matter of law to create a sufficient disputed question of fact as to causation, and thus the court affirmed the entry of summary judgment for the defendant. 284 F.3d 1237, 1257 (11th Cir. 2002). The Ninth Circuit reached a similar conclusion in *Rebel Oil,* and held, "The *Daubert* ruling did not require the district court to deny ARCO's motion for summary judgment." 146 F.3d 1088, 1097 (9th Cir.), *cert. den.*, 525 U.S. 1017 (1988). "An expert witness may be qualified to testify even though the

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[6] *Barnes v. Kerr Corp.,* 418 F.3d 583 (6th Cir. 2005) ("Even with this expert testimony, however, Barnes failed to establish causation and failed to raise a genuine issue of material fact. . . ."); *Morgan v. United Parcel Service of Am., Inc.,* 380 F.3d 459 (8th Cir.), *cert. den.*, 544 U.S. 999 (2004) ("Admissible regressions, however, do not necessarily mean summary judgment is inappropriate."); *Rebel Oil Co., Inc. v. Atlantic Richfield Co.,* 146 F.3d 1088 (9th Cir.), *cert. den.*, 525 U.S. 1017 (1998); *Bailey v. Allgas, Inc.,* 284 F.3d 1237 (11th Cir. 2002).

expert's conclusions are legally incorrect." *Id.* (citing *General Elec.*, 522 U.S. at 146). In Kochert's case, the district court correctly reached the same result. Pet. App., 29-30, n.4.

Based on the conclusion of the Second Circuit in *Eastern & So. Dist. Asbestos Litig.* that the district court improperly weighed the evidence, Kochert assumes that all courts, including the lower courts in this case, simply will not or cannot distinguish between admissibility and sufficiency of expert evidence. Kochert misstates the relevant standards of review and the district court holdings. "The mere existence of some evidence to support the non-moving party is not sufficient for denial of summary judgment; there must be 'sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.'" *Bailey*, 284 F.3d at 1243 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50.

It is appropriate for a court to evaluate the sufficiency of the evidence on a summary judgment motion. The Seventh Circuit is correct that Federal Rule of Civil Procedure 56(c) "allows some quantitative determination of the sufficiency of the evidence. The trial court still cannot resolve factual disputes that could go to a jury at trial, but weak factual claims can be weeded out through summary judgment motions." *Collins v. Associated Pathologists, Ltd.*, 844 F.2d 473, 476 (7th Cir.), *cert. den.*, 488 U.S. 852 (1988). Further, the summary judgment inquiry requires district courts "to engage in a qualitative review of the claim that goes beyond a minimum quantitative sufficiency of the evidence type of review." *Id.* Thus, if

"the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." *Id.* (internal quotations and citation omitted). Otherwise, it would be "a gratuitous cruelty to parties and their witnesses to put them through the emotional ordeal of a trial when the outcome is foreordained." *Mason v. Continental Ill. Nat'l Bank,* 704 F.2d 361, 367 (7th Cir. 1983).

Second, in finding that Kochert's expert opinions met the relevancy and reliability standards under *Daubert*, the district court focused "solely on principles and methodology, not on the conclusions [the experts] generate." Pet. App., 29-30, n.4; *see also id.* at 36 (Memorandum and Order on admissibility of Seaman opinion). The district court's rulings are consistent with this Court's instructions in *Daubert* and the Federal Rules of Evidence. The district court stated that in making its rulings on the admissibility of the parties' expert evidence, "it did not pass judgment on whether those opinions were persuasive or sufficient to create a genuine issue of material fact." *Id.* at 19. The district court properly addressed the sufficiency of Kochert's experts' opinions in its ruling on the motions for summary judgment.

The district court made detailed findings concerning Kochert's inability to show direct anticompetitive effects on the price, quality or quantity of anesthesia services. Pet. App., 24, 26-28. Kochert failed to offer any evidence that demonstrated the anticompetitive effects she claimed were attributable to an exercise of market power by the Respondents. *Id.* at 28. The district court's conclusions are consistent with *FTC v. Indiana Fed. of Dentists*, 476 U.S. 447 (1986), and *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984). The district court admitted the

testimony and repor[illegible] Kochert's expert, Dr. Bruce Seaman, but found that K[illegible]ert had failed, as a matter of law, to define a relevant geographic market. Pet. App., 28-31.

This case illustrates Justice Blackmun's point that application by district courts of the broader and more flexible standards for admissibility of expert testimony under *Daubert* simply does not affect application of other rules or the summary judgment analysis. 509 U.S. at 596; *accord General Elec. v. Joiner,* 522 U.S. at 142-43. This case does not present any reason to alter such well-settled principles.

3. The Lower Courts Provided Detailed And Clear Explanations Of Their Rulings, And There Is No Need For Further Instruction From This Court.

Kochert also contends that this Court should grant her Petition in order to instruct lower courts to "make clear the bases for their rulings" when there is a dispute about the admissibility of expert testimony and a motion for summary judgment presented to a district court. Pet. App., 11-12.[7] However, the rulings in this case are clear. The Seventh Circuit affirmed the December 29, 2004, entry of summary judgment by the district court in a well-reasoned, seventeen-page Opinion. Pet. App., 1-17. The district court issued a detailed, seventeen-page Memorandum and Order on December 29, 2004 (Pet. App., 18-34),

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[7] Kochert did not raise this issue in the Seventh Circuit, and arguably has waived the right to present the issue to this Court. *See Air Courier Conf. of Am. v. American Postal Workers Union, AFL-CIO,* 498 U.S. 517, 522 (1991).

explaining its reasoning for granting summary judgment on all counts of the Petitioner's Amended Complaint. The district court also entered detailed Memoranda and Orders regarding each of the *Daubert* challenges to her experts. Pet. App., 35-69. There is no need for further instruction to the lower courts based on the record presented here.

B. Kochert Lacks Antitrust Standing.

The lower courts correctly held that Kochert lacks antitrust standing as a matter of law. Standing under the Sherman Act goes beyond the United States Constitution Article III requirements, and requires a determination that "the plaintiff is the proper party to bring a private antitrust action." *Loeb Indus., Inc. v. Sumitomo Corp.*, 306 F.3d 469, 480-81 (7th Cir. 2002), *reh'g and reh'g en banc den.* (2003); *see also Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters,* 459 U.S. 519, 535 n.31 (1983). The two requirements for antitrust standing are the presence of an "antitrust injury" and a determination that the plaintiff is an "efficient antitrust enforcer." *Loeb,* 306 F.3d at 480-81. The district court found that Kochert lacks antitrust standing because she was no longer practicing anesthesiology by the time the acts about which she complains occurred (Pet. App., 23), and she alleged injuries personal to her as a competitor, but not injuries to competition as a whole. *Id.* at 24. Kochert is not an efficient enforcer of the Sherman Act. *Id.* at 24, 15-16.

1. Kochert Did Not Suffer An Antitrust Injury.

In *Brunswick Corp. v. Pueblo Bowl-O-Matic, Inc.*, this Court limited the application of Section 4 of the Clayton Act (15 U.S.C. § 4) by requiring the plaintiff to establish

more than injury caused by the defendant's conduct; the plaintiff must show that she has suffered an injury of the type the antitrust laws were designed to prevent and that her injury directly flows from that which makes the defendant's conduct illegal under the antitrust laws. 429 U.S. 477, 488-89 (1977). There must be a direct causal link between an injury to an interest of the plaintiff which is protected by the antitrust laws and the defendant's conduct in violation of the antitrust laws. *Id.; see also Greater Rockford Energy & Technology Co. v. Shell Oil Co.,* 998 F.2d 391, 395 (7th Cir. 1993), *cert. den.,* 510 U.S. 1111 (1994). A private plaintiff can recover on an antitrust claim only where the plaintiff's loss stems directly from "the competition-reducing aspect of the effect of the defendant's behavior." *Atlantic Richfield Co. v. USA Petroleum Co.,* 495 U.S. 328, 344 (1990). The district court correctly held that the loss Kochert claimed (reduced anesthesia income and increased expenses for her pain management practice) were not the type of interest protected by the antitrust laws and did not stem directly from the anticompetitive acts or the effects of the violations she claimed. App. Pet., 24.

At the outset, Kochert had difficulty establishing the requisite antitrust injury because the alleged precipitating event – the expiration of her 1998 Anesthesiology Associates subcontract – is not itself a violation of the antitrust laws. Kochert admitted this. Pet. App., 23. Kochert argued to the lower courts that the confluence of a series events: the March 1998 expiration of her Anesthesiology Associates subcontract; the 1999 GLHS decision to close the St. Elizabeth Medical Center obstetrics unit; and the 2001 decision by GLHS to use a single anesthesia provider at Home Hospital and St. Elizabeth Medical Center,

"create[d] anticompetitive concerns that might not have been present had those three events not been combined." *Id.* (quoting Kochert's Summary Judgment Brief at p.7). Whether viewed singly or together, none of these "concerns" caused Kochert to suffer an antitrust injury.

Kochert continued to practice anesthesia at St. Elizabeth Medical Center from 1998 until August, 2000, when she devoted herself exclusively to pain management. From 1998 through the present, Lafayette Anesthesiologists doctors continued to practice the full range of anesthesia services at St. Elizabeth Medical Center or other locations in the market area Kochert defined. Kochert was never excluded from the geographic or product markets defined by her own expert. The evidence Kochert presented to the district court showed that long before June 1, 2001, when GLHS decided to use a single anesthesia contractor for both Home Hospital and St. Elizabeth Medical Center, Kochert was no longer practicing anesthesia.

Kochert first brought an action against the Respondents in 1998 claiming Anesthesiology Associates' decision not to renew her subcontract was a violation of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e).[8] When that case was dismissed, Kochert sued the Respondents in Indiana state court alleging Anesthesiology Associates' decision not to renew her subcontract was a breach of contract or tortious interference with her business relationship with Home Hospital.[9] The district court was correct that Kochert's damages expert, Cornelius Hoffman,

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[8] *Carolyn Kochert, M.D. v. Lafayette Home Hospital, Inc., et al.*, Cause No. 4:98-CV-0053 AS (N.D. Ind. 2000).

[9] *Carolyn Kochert, M.D. v. Lafayette Home Hospital, Inc., et al.*, Tippecanoe Circuit Court, Cause No. 79C01-0001-CP-0007.

"determined that all of Kochert's damages were caused by the non-renewal of her subcontract with Anesthesiology Associates in 1998." Pet. App., 23. Kochert claimed damages in this case based on the expenses she incurred to open her own pain management practice in 1999 and 2000, but even her own expert admitted that those expenses were incurred before GLHS awarded a single contract to Anesthesiology Associates for both Lafayette hospital campuses. *Id.*

Thus, Kochert failed to establish any direct causal link between the injury she alleged and Anesthesiology Associates' alleged wrongful acts. *See Associated Gen. Contractors,* 459 U.S. at 544; *Greater Rockford,* 998 F.2d at 396 (plaintiff must show injury from the anticompetitive effects she claims); *see also Sanner v. Board of Trade of the City of Chicago,* 62 F.3d 918, 922 (7th Cir. 1995). Even ignoring the lack of temporal and causal connections between the violations and the injuries she claims, Kochert could not show under any set of facts that she was directly damaged by an anticompetitive effect on the price, quantity or quality of anesthesia services. Pet. App., 23-24. Admission of Kochert's experts' opinions could not change the fact that Kochert is neither a consumer, nor a provider, of anesthesia services. Pet. App., 24.

2. Kochert Did Not Demonstrate Injury to Competition.

Kochert's claims of *per se* antitrust violations failed as a matter of law. *See* Pet. App., 25; *Jefferson Parish,* 466 U.S. at 15. Kochert also failed to establish antitrust violations under the Rule of Reason. Pet. App., 25-27. At best, Kochert suffered mere economic loss, not an injury to competition. *See Brunswick,* 429 U.S. at 488-89. Kochert

failed to demonstrate an actual, adverse effect on competition as a whole in the relevant geographic and product markets. *See Indiana Fed. of Dentists,* 476 U.S. at 460-61. Her attempt to show that she, as an individual competitor, had been harmed was not sufficient to demonstrate damage to competition as a whole, even assuming that she suffered lost profits or diminished income as she claimed. Kochert simply failed to demonstrate injury beyond her economic loss that stemmed from an illegal exercise of market power by the Respondents. Pet. App., 27. Kochert was unable as a matter of law to sustain any of the antitrust violations she alleged.[10] *See HTI Health Servs., Inc. v. Quorum Health Group, Inc.,* 960 F. Supp. 1104, 1111 (S.D. Miss. 1997); *Davies v. Genesis Med. Ctr.,* 994 F. Supp. 1078, 1093 (S.D. Iowa 1998) (rejecting anesthesiologist's antitrust claims based on hospital exclusive service agreement). Because antitrust laws are designed to protect

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[10] Numerous courts have rejected antitrust claims similar to Kochert's. *Jefferson Parish,* 466 U.S. at 30; *Oksanen v. Page Mem'l Hosp.,* 945 F.2d 696, 708 (4th Cir. 1991), *cert. den.,* 502 U.S. 1074 (1992); *Ball Mem'l Hosp. v. Mutual Hosp. Ins., Inc.,* 784 F.2d 1325, 1338 (7th Cir. 1986); *Davies v. Genesis Med. Ctr.,* 994 F. Supp. 1078, 1093 (S.D. Iowa 1998). Cases allowing hospitals to enter into exclusive services contracts are legion. *Hager v. Venice Hosp., Inc.,* 944 F. Supp. 1530, 1537 (M.D. Fla. 1996) (collecting cases), *aff'd,* 132 F.3d 1461 (11th Cir. 1997); *see also BCB Anesthesia Care v. Passavant Mem'l Area Hosp.,* 36 F.3d 664, 667-69 (7th Cir. 1994). Removal of a single doctor from a local market is not evidence of an antitrust injury. *Blue Cross & Blue Shield United of Wisc. v. Marshfield Clinic,* 65 F.3d 1406, 1413 (7th Cir. 1995), *cert. den.,* 516 U.S. 1184 (1996). Anesthesiology Associates was not required to offer a subcontract to every anesthesiologist who wants one. *See Vakharia v. Little Co. of Mary Hosp. & Health Care Ctrs.,* 917 F. Supp. 1282, 1301 (N.D. Ill. 1996). ("Injecting the powerful medicine of the Sherman Act into the [plaintiff's] staffing dispute would be like treating a hangnail with amputation of the finger."). This case does not present any unique situation or other reason why this Court should not let the rulings of the lower courts stand.

competition as a whole, not individual competitors from economic loss, Kochert's claims failed. *See Atlantic Richfield,* 495 U.S. at 338. Kochert lacks antitrust standing as a matter of law, and this Court should deny the petition for a writ of *certiorari*.

3. Kochert Is Not An Efficient Enforcer Of The Antitrust Laws.

The lower courts found that even if an antitrust injury were found to exist, Kochert is not an "efficient enforcer" of the antitrust laws, *i.e.,* a proper antitrust plaintiff. Those with a more direct injury are more "efficient enforcers" of the antitrust laws. Patients, insurers or the government may be efficient enforcers, but not a disappointed competitor like Kochert. *See Davies,* 994 F. Supp. at 1096 (collecting cases); *see also Associated Gen. Contractors*, 459 U.S. at 544-45 (citing *Illinois Brick Co. v. Illinois,* 431 U.S. 720, 737-38 (1977)).

Kochert's only response in the lower courts was to state that competitors *can be* efficient enforcers. However, Kochert made no affirmative showing that *she* would be an efficient enforcer of the antitrust laws in this case. The Seventh Circuit was particularly troubled by the lack of directness between the injury Kochert claimed and the market restraint at issue. Pet. App., 15 (discussing *Sanner*, 62 F.3d at 927). Kochert is admittedly not a consumer of anesthesia services. Kochert has not been a provider of anesthesia services since at least the summer of 2000. The Seventh Circuit found the causal connection between Kochert's injury and the antitrust violation "tenuous at best." Pet. App., 16. Applying this Court's analysis in *Associated Gen. Contractors* (459 U.S. at 537-46), the

Seventh Circuit found no cause to "tip the scales away from our ultimate conclusion. Kochert does not have antitrust standing." Pet. App., 16. As someone covetous of, and a former party to, the very exclusive services contracts she challenged as illegal, Kochert's motivation is nothing more than her own self interest. Kochert's interest is simply in reshuffling competitors, not correcting an antitrust breach. *See Balaklaw v. Lovell,* 14 F.3d 793, 799 (2d Cir. 1994).

Because Kochert did not, and could not, as a matter of law establish the threshold antitrust standing requirements, the lower courts were correct in granting summary judgment for the Respondents. The Petitioner has presented no compelling reason to issue a writ of *certiorari,* and the rulings of the lower courts should stand.

CONCLUSION

For all the foregoing reasons, the Petition for writ of *certiorari* should be denied.

Respectfully submitted,

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